No. 80-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Petition for Naturalization of

ANTONIO OLEGARIO,

Petitioner-Appellee,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER-APPELLEE

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(10709)

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ARGUMENT

Both the Government's formulation of the "Questions Presented" and the contents of its "Statement" require modification.

I. The Bureaucracy's Deliberate Frustration of Both the Letter and Spirit of the Nationality Act of 1940.

Concededly, Congress enacted the Nationality Act of 1940 (Act hereinafter) as a reward to Filipino soldiers risking their lives in our defense.

The record discloses, however, that the bureaucracy frustrated the letter and spirit of the Act by revoking the authority of Mr. Ennis, our Vice-Consul in the Philippines, to naturalize Filipino war veterans.

A. The Claim of "Foreign Policy" Consideration is Specious.

The Government contends that the

revocation of Mr. Ennis' authority to naturalize Filipino war veterans was justified by consideration of "Foreign Policy", viz, that it revoked Mr. Ennis' authority at the request of (unidentified) Philippine government officials who feared the loss of young manpower. That contention is unsupported by the record: Indeed, it is contradicted by the record.

1. <u>There is no Evidence to Support the Government's Contention of "Foreign Policy"</u>.

The record is bare of any documentation of the Philippine government, or any of its officials requesting the revocation of Mr. Ennis' authority, or of any aide memoire, or the name of any Philippine official who made such a request orally as well as the name of any American official to whom any request, written or oral, was made.

B. The Record Strongly Suggests the Revocation of Mr. Ennis' Authority was Conceived and Executed solely by the American Bureaucracy because of its Fear of an Influx of Asiatics.

1. The Correction of a Crucial Fact and the Bureaucracy's Causing the Revocation of Mr. Ennis' Authority.

Up to now, the petitioner has not questioned the Government's claim that the revocation of Mr. Ennis' authority occurred in August, 1945. Incidentally, not only the petitioner but also Judge Tenney fell into that error.

In truth, as we shall below, Mr. Ennis' authority was revoked on or after September 26, 1945.

Judge Tenney cites a number of inter-bureaucratic memoranda to support his finding that there was substantial "concern" in the bureaucracy "about

admitting many newly naturalized citizens into the country" (App. 96a). Of course, the only "newly naturalized citizens" discussed in all the inter-bureaucratic correspondence were Filipino war veterans, i.e., Asiatics.

Typical is the letter of R. (Ruth) B. Shipley, Director, Passport Division (State Department) to Mr. Ugo Carusi, Commissioner of Immigration and Naturalization dated September 10, 1945, attached hereto as Exh. A. Mr. Carusi's memorandum to the Attorney General, attached hereto as Exh. B, which triggered the Attorney General's approval of the revocation of Mr. Ennis' authority followed his receipt only three days earlier of Ms. Shipley's letter.

A fair reading of Ms. Shipley's letter discloses two things: first, that there is not a single reference to any Philippine objection to the Act, and second, that the sole thrust of her letter is outspoken concern at the possibility of an influx of Filipino war veterans.

Although strongly troubled by the documentation, Judge Tenney found surcease in the erroneous assumption that the inter-bureau corespondence is dated after the (supposed) revocation of Mr. Ennis' authority (App. 96a).

Actually, the Attorney General approved the revocation of Mr. Ennis' authority on September 26, 1945, 13 days after his receipt of Commissioner Carusi's memorandum of September 13, 1945 (Exh. B), which was, obviously, impelled by Ms.

Shipley's letter of September 10, 1945 (Exh. A).

If, in fact, Mr. Ennis' authority was revoked in August, 1945, it was accomplished by middle-level bureaucracy, without the approval of the Attorney General, let alone a Presidential Executive Order or an Act of Congress.

The evidence establishes beyond peradventure, we suggest, that the revocation of Mr. Ennis' authority was motivated, instigated and accomplished by American bureaucracy in defiance of the letter and spirit of the Act; that the claim of "Foreign Policy" is but an after-thought, and that the true reason for the revocation of Mr. Ennis' authority was our bureaucracy's fear of an influx of a large

number of Filipino war veterans who happen to be Asiatics.

The revocation of Mr. Ennis' authority clearly appears to be an administrative abuse of power.

2. The Attorney General's Retroactive 1979 Ruling is a Violation of due Process.

The Government contends that the Attorney General's December, 1979 ruling precluding the granting of naturalization to Filipino war veterans applying after November 30, 1977 was predicated on "considerations of fairness to Filipino war veterans then litigating their cases, and not on invidious or improper grounds" (App. p. 96a, emphasis added).

"Then", it bears emphasis, is not December, 1979 when the ruling was issued

but 2 years earlier, viz, November 30, 1977.

Thus, the Government's position is that in December, 1979, the Attorney General could legally transmute "then" to November 30, 1977 - a date more than 2 years earlier. And "fairness", in this context, would appear to be a gross misnomer.

It bears emphasis that December 1979 is more than 2 years after the dismissal of the Government's appeal in 68 Filipino War Veterans, 629 F.2d 204(9th Cir.); more than 1 year after this petitioner applied for naturalization and more than 6 months after the District Court's ordering petitioner's application without a single intimation that a cut-off date for applications for naturalization by Filipino war veterans was

being considered. The unkindest cut of all; had petitioner not consented to the Government's successive requests for extensions of time to perfect his appeal, the argument before the Court of Appeals might well have taken place BEFORE the Attorney General's directive.

With Chew Heong v. United States, 112 U.S. 536, and its fellow determinations still the law of the land, it would follow that the Attorney General's 1979 ruling, insofar as it retroactively bars naturalization to Filipino war veterans applying for citizenship after November 30, 1977 must be stricken.

If stricken, the Government's case must collapse in the light of the numerous uniform determinations upholding the rights of Filipino war veterans to naturalization (in some of which the Government

has withdrawn its appeals) decided after November 30, 1977.

Petitions for Naturalization of Danao, Dkt. No. 79-6127 (2d Cir. 1979); Petitions of Avena, et al, Dkt. No. 79-4361, (9th Cir. 1979); Petition of Neria, ____F. Supp. ___ (D.C. Md. 1979); Petition of Colmenar, No. 22551 (S.D. Cal. 1979); Petition of Nisperos, Dkt. No. ____ (C.D. Cal. 1979); Petition of Carpio, No. Civ. 79-342 (E.D. Cal. 1980).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

GLASSMAN & ELIAS, ESQS.
Attorneys for Petitioner

Of Counsel:

Joseph L. Forscher

February, 1981

(i)

"September 10, 1945

In reply refer to
132(1940)W.P.A.----Manila/14

Mr. Ugo Carusi,
Commissioner,
Immigration and Naturalization
Service, Philadelphia 2,
Pennsylvania.

My dear Mr. Carusi:

This Department has received a confidential despatch dated August 6, 1945, from the American Consul General at Manila, relative to problems being faced there by the Special Naturalization Examiner in carrying out naturalization proceedings under the provisions of Section 702 of the Nationality Act of 1940, as amended. In the despatch referred to information is requested relative to whether persons serving in the Philippine army are considered to be in the military or naval forces of the United States. The Consul General pointed out in this connection that he has received information to the effect that there are approximately 250,000 men in the Philippine army including guerillas incorporated in or to be incorporated into the army, and that while it is not anticipated that all

persons eligible would desire to be naturalized there are undoubtedly a great many who for economic or political reasons would desire to do so.

This Department will be pleased to convey to the Consul General for the information of the Special Naturalization Examiner at Manila any comments which your office may desire to make relative to the question raised in the above mentioned despatch.

Sincerely yours,

Enclosures:
Copy of this letter

s/R.B. Shipley
R.B. Shipley
Chief, Passport Division"

Ex. A(2)

Three days later, in a memorandum dated September 13, 1945, the Commissioner brought Mrs. Shipley's letter to the Attorney General's attention. After reviewing issues which had been resolved earlier with respect to sections 701 and 702, the Commissioner wrote:

"The Philippine Government again has expressed to the Department of State its concern because Filipino members of the Armed Forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. Since the islands are not embraced within the domain of any naturalization court, naturalization therein may be awarded only by an administrative official designated by me under the authorization of Section 702 of the Nationality Act, 8 U.S.C. 1002. Mr. George H. Ennis, Vice Consul of the United States in Manila, has been designated to grant naturalization under Section 702, but I do not believe he has as yet exercised his authority.

In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

Ex. B(2)